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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5306

ERNEST JOHN DOBBERT, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Florida Supreme Court (A. 51) affirming the judgment and sentence of the Circuit Court of the Fourth Judicial Circuit of Florida is reported at 328 So.2d 433 (Fla., January 14, 1976). The Order of the Florida Supreme Court denying the petition for rehearing (A. 80) also appears at 328 So.2d 433 (Fla., April 5, 1976).

JURISDICTION

The decision of the Florida Supreme Court was handed down January 14, 1976. A timely petition for rehearing was filed (A. 73), duly amended (A. 78) and denied April 5, 1976 (A. 80). A motion for extension of time to file the petition for a writ of certiorari was granted by Justice Powell June 16, 1976, with leave to file by September 2, 1976. The petition was timely filed and was granted on November 8, 1976 (A. 99). A motion for extension of time for the filing of the brief on the merits was granted by Justice Powell on December 9, 1976, with leave to file by January 7, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3) (1970).

QUESTIONS PRESENTED

1. Whether the imposition of the death penalty, as to this Petitioner, pursuant to a Florida statute which became effective subsequent to the date of the offense for which the Petitioner was convicted, was a violation of the Florida and Federal Ex Post Facto prohibitions and a denial of equal protection of the laws.

2. Whether the totality of the circumstances surrounding the Petitioner's trial shows inherent prejudice in the pre-trial setting and jury selection process to the extent that the Petitioner was denied due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., art I, Section 10.
U.S. Const., amend. XIV, Section 1.

Fla. Const., art. I, Section 10.
Fla. Const., art. X, Section 9.
Fla. Stat., Section 921.141 (1971).
Fla. Stat., Section 775.082 (1971).
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Fla. Stat., Section 775.082 (1973).
Ch. 72-724, Laws of Florida (1972).
Fla. Stat., Section 921.141 (1973).

The pertinent verbatim texts of the above-cited provisions appear at A. 87 *et seq.*

PRELIMINARY STATEMENT

References to the Record on Appeal, Volume I, will be designated by the symbol "R" in parentheses followed by the appropriate page number. References to the Record on Appeal, Volumes II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, and XIII, which are the transcripts of various pre-trial court proceedings, will be designated by the appropriate volume number in parentheses followed by the appropriate page number. References to the Record on Appeal, Volumes XIV and XV, which is the transcript of the hearing on the motion for change of venue, will be designated by the symbols "CV" in parentheses followed by the appropriate page number. References to the Record on Appeal, Volumes XVI through XXIX, which is the transcript of jury selection and trial, will be designated by the symbols "Tr" in parentheses followed by the appropriate page number. References to the Record on Appeal, Volume XXX, which is the proceedings on the jury advisory sentence, will be designated by the symbols "JA" in parentheses followed by the appropriate page number.

STATEMENT

In January of 1972, an anonymous phone call notified the Division of Family Services (a subdivision of the Florida Department of Health and Rehabilitative Services) that there was evidence of child abuse at the residence of Ernest John Dobbert, Jr., in Jacksonville, Florida. A social worker from the Division of Family Services contacted a neighbor of Mr. Dobbert and made a preliminary determination that the anonymous caller had been mistaken. Before closing the case, the social worker personally contacted Mr. Dobbert and was told that the Dobbert children were in good health. The worker observed one child with Mr. Dobbert and was told by Mr. Dobbert that one other child was living with him in Jacksonville and that the other two children were in Wisconsin with Dobbert's mother. Mr. Dobbert further informed the worker that he intended to leave Jacksonville with the two children and return to his mother's home in Wisconsin. Following this meeting with Mr. Dobbert, the case was closed and filed away.

In the Spring of 1972, the Petitioner's son, Ernest John Dobbert, III, was found wandering outside a Holiday Inn in Jacksonville, Florida. Jacksonville police turned the boy over to the Division of Family Services. It was apparent that the boy had suffered injuries of one type or another to his back, his head and his feet. Upon questioning, the boy initially indicated that he scraped his back on coral while swimming off a local beach. Following a brief confrontation with the Petitioner, the boy was taken before a local circuit judge who promptly placed the boy in the protective custody of the Division of Family Services. The boy told the judge that his injuries were a result of beatings by his father, that his brother and one of his sisters were dead

as a result of beatings by his father, and that his remaining sister was at home with the father locked in a closet. The judge issued a warrant for Petitioner's arrest. Prior to service of the warrant, Petitioner left Jacksonville and apparently proceeded to Fort Lauderdale, Florida. On April 13, 1973, Petitioner's daughter, Honore Elizabeth Dobbert, was found in a hospital in Fort Lauderdale with a note pinned to her clothing asking that she be sent to her mother in Wisconsin. The Petitioner's abandoned automobile was found under a bridge at the edge of the Intracoastal Waterway in Fort Lauderdale with a suicide note on the front seat. The two Dobbert children were reunited under the protective custody of the Division of Family Services in Jacksonville and a search for their father, the Petitioner, began.

Press coverage began almost immediately and closely followed Petitioner's arrest in Texas and his ultimate extradition and return to Florida in October of 1973.

An indictment (A. 2) was filed December 27, 1973, charging the Petitioner with two counts of murder in the first degree and two counts of child torture. On January 14, 1973, Petitioner filed a Motion to Dismiss addressed to the Indictment of December 23, 1973, stating in paragraph 2:

> "The allegations contained therein are vague and indefinite in violation of the Constitutions of the United States and of the State of Florida because the bare allegation of a Statute number does not adequately and constitutionally inform the Defendant of what statutory violation he has been charged or inform the Defendant of whether the indictment and subsequent proceedings under that statute will violate the prohibition against ex post facto laws or violate the equal protection or other constitutional protections guaranteed to the Defendant. . . ." (R 7).

In ruling on the motion, the trial court made the following marginal notations on the face of the motion proper:

> (Left Margin) "See Lee case '1st District' Nov. 73 – which says crime committed under old 782.04[1] – subject to new 782.04; 921.121"
>
> (Right margin) "See Rudolph V. Lee case re: comit (sic) crime before death penalty subject to New death penalty." (R 7).

On January 15, 1973, Petitioner filed a motion (A. 7) requesting the trial court to enter an order specifying the manner of trial, number of trial jurors, and the penalties applicable to counts one and two of the indictment. As grounds for the motion, Petitioner stated:

> "1. The indictment herein only alleges a violation of Florida Statutes 782.04 and the undersigned attorney submits that there is presently great confusion in the law as to the manner of trial and the applicable penalties in a case where the alleged offense occurred at the time specified in this indictment.
>
> 2. The confusion exists as a result of the case of *State v. Lee*, Case No. R-452, 1st DCA Florida, November 2, 1973, question certified to Florida Supreme Court January 7, 1974.
>
> 3. Unless this court enters its pretrial order as requested, defense counsel is unable to properly advise the defendant herein and is unable to properly prepare a defense."

The first degree murder charged in count one of the indictment of December 27, 1973, alleged that the

[1] Fla. Stat., Section 782.04 (1971) and Fla. Stat., Section 782.04 (1973) set forth the elements of the crime of murder in the State of Florida.

death occurred on December 31, 1971. The first degree murder charged in count two of the indictment alleged that the death occurred between the 1st day of January and the 8th day of April, 1972. The trial court entered an order (A. 16) which sets forth verbatim:

> The within motion coming on to be heard in open Court, defendant being present and arguments presented, IT IS, THEREUPON, CONSIDERED ORDERED AND ADJUDGED that said Motion be and the same is hereby (sic) the court rules that this is a capital-death penalty with twelve man jury – DONE AND ORDERED in open Court this 22nd day of February, A.D. 1974."

On January 30, 1974, Petitioner filed a motion for continuance (A. 8). The trial court denied the motion for continuance on February 4, 1974. On February 8, 1974, the State filed an amended indictment, again charging two counts of murder in the first degree and two counts of child torture. Also on February 8, 1974, the Petitioner filed an application for constitutional stay of trial (A. 81). The application, filed pursuant to Rule 4.5(g), Florida Appellate Rules, raised the question of an *ex post facto* application of the new Florida death penalty sentencing statute.[2]

At the time of Petitioner's application for stay of trial in the Florida Supreme Court, the case of *Lee v. State*, 294 So.2d 305 (Fla. 1974), was on petition for writ of certiorari to that court and oral arguments were pending therein.

Oral arguments were heard on Petitioner's application for stay of trial on February 18, 1974, and an order denying the application was entered the same day.

[2] Ch. 72-724 (A. 89) which went into effect December 8, 1972.

On March 7, 1974, Petitioner filed a motion and affidavit for change of venue (A. 17), pursuant to Rule 3.240, Florida Rules of Criminal Procedure, and cited as grounds, *inter alia*:

> "1. That Defendant stands accused of acts which are inherently odious and subject to inflammatory exploitation by the press and the electronic news media.
>
> 2. That the acts of which Defendant stands accused have in fact been widely exploited by the press and the electronic news media to the extent that Duval County, Florida, has become irreparably permeated with prejudicial publicity.
>
> 3. That the extensive publicity concerning the Defendant has included detailed accounts of the investigation of the case, a search for bodies by certain members of the Jacksonville Police Department accompanied by television news men, the flight of the Defendant, his subsequent extradition and arrest and lengthy speculation concerning the probable development of the factual and legal issues to be decided at trial.
>
> 4. That, as a result of the extensive publicity in this case, defendant has become known by name to the general populous of Duval County and Northeast Florida and that his name has come to be equated with the odious and infamous crime of child torture.
>
> 5. That the notoriety of this Defendant has been cited in the local press by an official employed by the Division of Family Services (State Department of Health and Rehabilitative Services) as a causative factor in the documented increase in reported cases of child abuse in Duval County, Florida.
>
> 6. That as a direct consequence of this extensive publicity and resulting notoriety, the atmosphere prevailing at this time, and likely to become

> exacerbated during the period immediately preceding trial, is so latent with the possibility of prejudice to this Defendant that there is reason to believe that a fair and impartial trial cannot be had in Duval County, Florida."

The supporting affidavits of three prominent Jacksonville attorneys were filed with the motion (A. 19-24). On March 12, 1974, following eleven months of continuous and unrelenting publicity concerning the case, the trial court entered a "gag order" (A. 25) forbidding the Jacksonville Sheriff's Office and all court personnel from making statements to the news media at any time before or during the trial. On March 15, 1974, an evidentiary hearing on the Petitioner's motion for change of venue was held (CV 4-284). The Petitioner presented twelve witnesses, representatives of the news media in Jacksonville, Florida, displayed video taped news stories and introduced exhibits of media coverage of the case. Following arguments of counsel, the trial court entered the following order:

> "Motion under advisement after one day of testimony & evidence, till it is determined from jury selection – if it (sic) possible to get a fair & impartial jury." (A. 27).

Jury selection was scheduled for March 18, 1974. Prior to the commencement of the voir dire examination, the Petitioner objected to the method of trial selected by the trial court:

> "MR. SOUTHWOOD: Your Honor, also at this time I recall there was a motion made by the defense to – that the court set forth the number of jurors in which (sic) this case will be tried. The court made its ruling. I did not see a written order to that effect and since I did not actually move to have it tried one way or the other, I would like to formally object at this time to the case being tried

by twelve jurors and having the death penalty applicable to the first two counts.

THE COURT: Yes, sir. All right, the court previously ruled that this was a death penalty or capital case and that the manner of trial would be by twelve man jury with the appropriate number of alternatives. All right, I deny the motion." (Tr 25).

The voir dire examination began the morning of March 19, 1974, and continued until 10:15 A.M., Thursday, March 21, 1974, when counsel for Petitioner announced:

"MR. SOUTHWOOD: The defense accepts the jurors tentatively. We would like to say that we do it with reservations. The defendant moved for a change of venue. It was taken under advisement and denied pending jury selection. The defendant does not waive this motion. The evidence presented in the change of venue shows the defendant would not receive a fair trial in Duval County. . . . [I]t would be unfair, and it further prejudiced the defendant's right to a fair trial if we were required to exercise all our peremptory challenges, since he must choose from a jury panel here in Duval County. Be tried from a jury panel here in Duval County. It must be clear on the record we don't waive our change of venue motion, but we will accept this jury because it is the best jury under the circumstances, but does not meet the constitutional standards for fair trial." (Tr 1266).

Eighty-eight veniremen had been interviewed. Prior to the final day of jury selection, the Petitioner had exercised twenty-seven of his thirty-two peremptory challenges. There were forty-seven prospective jurors remaining for selection in the courtroom and seventy-five more available on call from the regular circuit court panel of jurors not used by other courts in session.

Out of the eighty-eight examined on voir dire, only thirteen had no knowledge of the facts of the case. Of the thirteen, two were ultimately chosen to sit as jurors, seven were excused by the State, two were excused by the Petitioner, and two were excused for cause.

The trial proper began on March 25, 1974. On Friday, March 29, 1974, the jury returned verdicts of guilty of murder in the first degree as to count one of the amended indictment, guilty of murder in the second degree as to count two, guilty of child abuse (a lesser included offense) on count three, and guilty of child torture on count four.

A hearing pursuant to the new Florida death penalty sentencing provision was held the following morning. Prior to the commencement of the hearing proper, the Petitioner again objected to the application of the death penalty to this case:

"MR. SOUTHWOOD: Judge, may I make just one note –

THE COURT: Yes, sir.

MR. SOUTHWOOD: – for the purpose of the record? I would like to further object to this proceeding in that I do not feel, again, that the death penalty is applicable in this particular case or, of course, constitutional in any other crimes." (JA 20).

The court reiterated its earlier ruling as follows:

"THE COURT: All right, I deny the motion, proceeding under various cases as the Rudolph Valentine Lee and other cases which I think justify the bifurcated trial." (JA 20).

Following the presentation of psychiatric reports and the arguments of counsel, the jury rendered an advisory

sentence finding sufficient mitigating circumstances outweighing any aggravating circumstances and recommending by a ten to two majority a sentence of life imprisonment (A. 28).

The Petitioner filed a timely motion for new trial on April 8, 1974 (A. 30). The motion for new trial was denied by the trial court on April 12, 1974 (A. 32). On that date the trial court overruled the advisory sentence of the jury and sentenced the Petitioner to death on count one of the amended indictment and to the maximum prison terms on counts two through four, all sentences to be served consecutively (A. 33).

The Petitioner was adjudged insolvent for purposes of appeal and a timely notice of appeal to the Florida Supreme Court was filed on April 25, 1974. The constitutional questions presented here were assigned as errors on appeal, briefed and appeared before the Florida Supreme Court as follows:

> "II. THE TRIAL COURT ERRED IN FAILING TO CHANGE VENUE AND IN PROCEEDING WITH TRIAL IN JACKSONVILLE, FLORIDA.
>
> III. THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO DEATH.
>
> A. THE TRIAL COURT ERRED IN RULING THAT CAPITAL PUNISHMENT WAS APPLICABLE IN THE CASE AT BAR."

Oral arguments were heard by the Florida Supreme Court on April 3, 1975, and the court affirmed the judgment and conviction in the trial court. *Dobbert v. State*, 328 So.2d 433 (Fla. January 14, 1976) (A. 51).

The Florida Supreme Court did not address the *ex post facto* question in its decision. As to the trial court's failure to grant the Petitioner's motion for a

change of venue, the majority opinion, citing *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed 2d 589 (1975), held that the trial judge did not abuse his discretion in denying the motion for change of venue. *Dobbert* at 440.

There were two dissenting opinions: Justice Boyd would have reversed for the trial court's failure to charge the jury that it was authorized by law to find the Petitioner guilty of attempted murder and for the failure of the trial court to grant the Petitioner's motion for change of venue; Justice England would have reversed the trial court's decision to overrule the advisory sentence of the jury and would have required the adoption of the jury's recommendation of life imprisonment, citing *Tedder v. State*, 332 So.2d 908 (Fla. 1975).

Petition for Rehearing was denied on April 5, 1976. Application for Stay of Execution of the death sentence in this case was granted by Justice Powell on May 3, 1976. A Motion for Extension of Time to File the Petition for Writ of Certiorari was granted by Justice Powell on June 21, 1976. The petition was granted on November 8, 1976 (A. 99).

SUMMARY OF ARGUMENT

The *Ex Post Facto* Violation

Petitioner argues that the application of the December 8, 1972 Florida Statutes concerning the imposition of penalties for capital crimes to the 1974 trial of a defendant charged with a pre-*Furman* capital crime was in violation of the Florida and Federal prohibitions against *ex post facto* laws. In support of this position, Petitioner argues that he was exposed to a greater

penalty than that *which would have effectively been applied to him* under the law in effect at the time of the alleged offense, and that the standard of punishment under the 1972 statutes was more onerous than under the law at the time of the alleged offense.

Petitioner's argument is based on the different results achieved by the application of the 1971 and 1972 statutes respectively, as illustrated by the following:

A. By application of the Florida death penalty statute which went into effect on December 8, 1972,[3] the Petitioner was sentenced to death. By application of the Florida death penalty statute in effect on December 31, 1971[4] (the alleged date of the offense for which Petitioner was convicted and sentenced to death), and pursuant to the decisions of this Court and the Florida Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Donaldson v. Sack*, 265 So.2d 499 (Fla. 1972), respectively, Petitioner could have received no more than a sentence of life imprisonment.

B. By application of an associated Florida sentencing statute which became effective December 8, 1972,[5] Petitioner went to trial facing the possibility of a sentence of death or life imprisonment with no eligibility for parole for twenty-five years. By application of the related sentencing statute in effect on December 31, 1971,[6] the Petitioner would have faced the possibility of a sentence of death or life imprisonment with no restriction on his eligibility for parole.

---

[3] Fla. Stat., Section 921.141 (1973), Ch. 72-724, Laws of Florida (1972) (A. 91-98).

[4] Fla. Stat., Section 921.141 (1971) (A. 88).

[5] Fla. Stat., Section 775.082(1) (1973), Ch. 72-724, Laws of Florida (1972) (A. 88-89, 91).

[6] Fla. Stat., Section 775.082 (1971) (A. 88).

C. By application of the two related Florida statutes in effect at the time of Petitioner's trial, conviction and sentencing, the trial judge was permitted to overrule a ten to two majority recommendation by the jury and impose a sentence of death. By application of the two related Florida statutes in effect at the time of the alleged offense, a jury recommendation of mercy could not be ignored or overruled by the trial judge. The law mandated that upon "a recommendation to mercy by a majority of the jury . . . the punishment *shall* be life imprisonment." (Emphasis added), Fla. Stat., Section 775.082(1) (1971) (A. 88).

The Denial of Equal Protection

Petitioner argues that the death penalty was not applicable to Petitioner, and its application in this case constituted a denial of equal protection of the laws. All individuals whose crimes were committed pre-*Furman* and who were convicted and sentenced to death prior to the effective date of the new Florida death penalty statutes have had their death sentences commuted to life imprisonment.[7] Had Petitioner been arrested, tried, convicted and sentenced to death prior to the effective date of the new statutes, his sentence would have been commuted to life. It is a denial of equal protection of the laws to apply the new statutes retroactively.

The equal protection argument can best be illustrated by the following hypothetical:

---

[7] In every case the new sentence was life imprisonment with no restriction on eligibility for parole. *See Anderson v. State*, 267 So.2d 8 (Fla. 1972); *In Re Baker*, 267 So.2d 331 (Fla. 1972); *Rudolph Valentine Lee v. State*, ____ So.2d ____ (Fla. December 9, 1976).

If Petitioner's wife had been charged as a co-defendant in the December 31, 1971 murder of Kelly Ann Dobbert; if she had been tried, convicted and sentenced to *death* under the provisions of the 1971 statutes (with no jury recommendation of mercy); then, by operation of the decisions of the Florida Supreme Court in *Anderson v. State*, 267 So.2d 8 (Fla. 1972) and *In Re Baker*, 267 So.2d 331 (Fla. 1972), her death sentence would have been commuted to life. Petitioner is not brought to trial until 1974. Upon conviction his jury votes ten to two for life imprisonment. Instead, the trial judge overrules the jury and imposes the death sentence. The disparate results are brought about solely due to the difference in the dates of the respective trials.

There can be no valid basis for such an invidious discrimination.[8]

Change of Venue – Due Process

Petitioner argues that the denial of his pre-trial motion for change of venue and his subsequent trial in Jacksonville, Duval County, Florida, exposed him to

[8] Petitioner has become aware of the existence of other Florida defendants who fall into the same category of pre-*Furman* crime–death penalty applied. *See Miller v. State*, 332 So.2d 65 (Fla. April 7, 1976). There may be other such defendants yet to come to trial. This in no way alters the validity of the equal protection argument. In *Miller*, the sole reason for the trial being held after the effective date of the new death penalty statutes was the defendant's incompetence to stand trial. He remained in a state mental health facility until August 22, 1973, and was convicted on February 23, 1974. *Id.* at 67. It would appear that Miller also has a valid equal protection argument as well as a valid *ex post facto* claim.

trial by a jury panel composed of members of a community irreparably permeated with prejudicial publicity so that he was denied due process of law.

The Petitioner's trial was conducted in the heated atmosphere of an intensive pre-trial media barrage which continued unabated throughout the proceedings notwithstanding a gag order imposed on court personnel and police. By ordering Petitioner to attempt to select a jury in this atmosphere, the trial court presented Petitioner with a Hobson's choice: select the least prejudiced of the local jurors, or arbitrarily exercise all peremptory challenges in order to preserve an issue for appeal.

There are cases where the infection of the public by pre-trial publicity is patent. Prejudice inheres in the trial setting by virtue of the nature of the offense and the means by which the news concerning it is hammered into the psyche of the community. This is such a case.

ARGUMENT

I.

THE APPLICATION OF A FLORIDA DEATH PENALTY PROVISION NOT IN EXISTENCE AT THE TIME OF THE OFFENSE CHARGED WAS A VIOLATION OF CONSTITUTIONAL EX POST FACTO PROHIBITIONS.

A. Life imprisonment was the only penalty for first degree murder in effect on December 31, 1971.

Historically, violations of constitutional *ex post facto* prohibitions have been measured against the standards

set by Mr. Justice Chase in *Calder v. Bull*, 3 U.S. 386 (1798):

> "I will state what I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. *Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.* 4th. Every law that alters the legal rules of evidence, and receives, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." (Emphasis added) *Id.* at 390.

These basic categories have been extended by later courts to encompass situations where a change in the law of a state as applied to an individual makes "more onerous" the effect of the law, *Lindsey v. Washington*, 301 U.S. 397 (1937), or acts to the substantial disadvantage of the individual. *Kring v. Missouri*, 107 U.S. 221 (1882).

A related standard has developed out of the case law since *Calder v. Bull, supra*. For a law to be classified as *ex post facto* in its application it must be shown to have effected a change in the substantive law rather than to have merely changed the procedure by which an individual makes his way through the criminal justice system, *Thompson v. Utah*, 170 U.S. 348 (1898) and *Beazell v. Ohio*, 269 U.S. 167 (1925).

In order to apply these standards in the case sub judice, it is first necessary to establish what was the law in effect at the time of the alleged offense and what effect it could have on Petitioner in light of this Court's decision in *Furman, supra*, and subsequent Florida decisions.

Respondent's position below was that the penalty for first degree murder in effect at the time of the offense in this case was death and that the penalty at the time Petitioner was sentenced was death so that there was no change in the punishment and therefore no *ex post facto* violation. Petitioner would assert that there was no *valid* death penalty provision in effect at the time of the alleged offense.

There was a statute providing for a death penalty in capital crimes in existence on the date of the alleged offense,[9] as well as a statute for implementation of the death penalty.[10] But as of December 31, 1971, there had not been an execution in the State of Florida since 1964. The statutes noted above were under attack in state and federal courts and similar statutes in Georgia and other states were before this Court in *Furman, supra*. The Georgia and other related death penalty statutes were voided in that decision on June 29, 1972.

Following the decision in *Furman, supra*, some confusion arose over its application to the Florida statutes. This was soon dispelled by the Florida Supreme Court in *Donaldson v. Sack, supra* wherein the court stated:

> "We have examined every reasonable avenue to uphold the several statutes and rules insofar as they assert 'capital offense,' as we must do under the rule favoring validity unless clearly indicated otherwise. We are unable in the face of existing authorities and logic to find support for the continuance of 'capital offense' as heretofore applied. Accordingly, it must fall with the U.S. Supreme Court's holding against the death penalty

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[9] Fla. Stat., Section 775.082(1) (1971) (A. 88).

[10] Fla. Stat., Section 921.141 (1971) (A. 87).

as provided under present legislation. Our decision is compelled by that Court's action." At 501.

The immediate result of the decisions in *Furman* and *Donaldson v. Sack, supra*, was the re-sentencing by the Florida Supreme Court of all prisoners under sentence of death in the State of Florida to life imprisonment. *Anderson v. Florida, supra, In re Baker, supra*, and *Adderly v. Wainwright*, 58 F.R.D. 389 (M.D. Fla. 1972).

With no "capital offenses" punishable by death in the State of Florida, anyone accused on December 31, 1971 (the date of the alleged offense in the case sub judice), of what had been a capital offense and sentenced to death would have had his sentence commuted to life. There could be no valid penalty of death imposed for crimes committed prior to *Furman, supra*. Notwithstanding the statutory language in effect, the only possible sentence for a crime committed on December 31, 1971 was life imprisonment.

The retroactive commutation of prior death sentences in *Anderson, Baker* and *Adderly, supra*, was done in recognition of the fact that the existing statutes were constitutionally void insofar as they provided for a penalty of death. *Donaldson v. Sack, supra.* The subsequent enactment of new death penalty provisions[11] could not act to revive the death penalty for crimes committed prior to their effective date.[12]

Following *Furman, supra*, the Georgia Supreme Court acted to remove the possibility of a death sentence for capital crimes:

> "In view of the recent decisions by the Supreme Court of the United States in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed 2d 346, and related cases, which prohibit further imposition of the death penalty under existing statutes, direction is given to the trial court as follows: The presiding judge in the trial court shall enter a judgment sentencing the defendant to be imprisoned for the balance of his life, this being the only lawful sentence which may be entered upon the conviction and finding of the jury that the defendant should receive the maximum sentence permitted by law." *Sirmans v. State*, 194 S.E.2d 476 (Ga. 1972) at 477.

[11]Ch. 72-724, Laws of Florida (1972).

[12]Ch. 72-724 went into effect on December 8, 1972.

The Georgia legislature soon enacted a new death penalty statute which was applied to one Chester Thomas Akins. Akins was convicted of kidnapping, rape and burglary, all of which were alleged to have accurred on November 19, 1972. The new act was signed into law on March 28, 1973, and Akins was sentenced to death in May of 1973.

In reversing the death sentence, the Georgia Supreme Court, *citing Sirmans*, held:

> "At the time the crimes here occurred a death sentence could not be imposed, and the later enacted statute, if applicable to the defendant here, would of necessity be an ex post facto law. Ex post facto laws are clearly prohibited." *Akins v. State*, 202 S.E.2d 62 (Ga. 1973).

This is not to say that trials could not still be conducted pursuant to the pre-*Furman* statutes. The Florida Supreme Court in *Donaldson v. Sack, supra*, invalidated only the application of the death penalty under those statutes:

> "The elimination of the death penalty from the statute does not of course destroy the entire statute. We have steadfastly ruled that the remaining consistent portions of statutes shall be held constitutional if there is any reasonable basis for

doing so and of course this clearly exists in these circumstances." At 502-503.

In review, there was no valid death penalty in effect at the time of the offense in this case. There remained a valid procedure established by the highest court of the State of Florida for sentencing an individual convicted of a "capital offense" to life imprisonment.[13] Procedure was to be conformed to the trial of non-capital cases with six rather than twelve jurors and no requirement of *Witherspoon*[14] qualification on *voir dire.*

By applying the December 8, 1972, death penalty statutes the trial court changed the possible punishment from life to life or death.[15] There could be no more substantive change in the law.

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[13]"We find no difficulty with a continuation of the *sentencing* for these former 'capital offenses' under Section 775.082(1) as automatically life imprisonment, inasmuch as that is the only offense left in the statute." (Emphasis added), *Donaldson, supra* at 502.

[14]*Witherspoon v. Illinois*, 391 U.S. 510 (1968).

[15]The trial court was not unaware of the procedures outlined in *Donaldson v. Sack, supra*, and was in fact in the process of completing pre-trial motions in the case of the State of Florida v. Franklin Delano Prince. Prince was tried for first degree murder before a jury of six, convicted, and was sentenced to life imprisonment pursuant to the pre-*Furman* statutes without a recommendation from the jury. The trial ended January 25, 1973 and sentencing was on February 2, 1973, for a September, 1972 crime after the effective date of the new Florida death penalty statutes. *See, Prince v. State*, 297 So.2d 648 (1st DCA Fla. 1974), *cert. den. on other grounds*, 304 So.2d 129 (Fla. 1975).

B. Allowing the trial judge to overrule a jury recommendation of mercy acted to deprive Petitioner of a substantial right.

1. If it can be argued that the 1971 death penalty statutes were in full force and effect on December 31, 1971, then that statute must be compared in operation to the statutes which went into effect on December 8, 1972.

If Petitioner had been sentenced under Section 921.141, Florida Statutes (1971) (A. 87), there would have been no bifurcated penalty trial. The jury would have been asked to return a verdict with or without a recommendation of mercy. Upon a recommendation of mercy the trial judge would have had no choice but to sentence the Petitioner to life imprisonment.

In fact, the Petitioner was sentenced pursuant to Section 921.141, Florida Statutes (1973) (A. 95). A bifurcated penalty trial was held (JA 3-73) wherein virtually the only mitigation presented was a reading of an excerpt from Louis Nizer's book describing the executions of Ethel and Julius Rosenberg.[16]

The advisory sentence rendered by the jury was a majority (ten-to-two) recommendation of life imprisonment (A. 28). The trial court exercised his option under the new statute and imposed a sentence of death (A. 33).

The result is that where Petitioner's jury's recommendation of life imprisonment would have been followed automatically under the law at the time of the offense, it was overruled and converted to a death sentence by application of the new law.

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[16]*The Implosion Conspiracy*, Louis Nizer, Doubleday and Company, Garden City, New York (1973).

2. Regardless of the actual recommendation by Petitioner's jury and the ultimate sentence of death, the statutory change effected by the Florida Legislature in Chapter 72-724, Laws of Florida (1972), relating to the discretion afforded the trial judge in sentencing, added a measure of punishment not present in the earlier law.

While the new statutes were upheld by the Florida Supreme Court in *State v. Dixon*, 283 So.2d 1 (1973), and by this Court in *Proffitt v. Florida*, 96 S.Ct. 2960, ____ U.S. ____ (July 2, 1976), the nature of the prejudice to Petitioner is not altered. Petitioner had a substantial right in the absolute discretion of the jury to decide whether he would live or die.

In *Winston v. State*, 198 S.E. 667 (Ga. 1939), the Georgia Supreme Court was faced with a 1938 statute which removed the power to determine life or death sentences in capital cases from the jury and vested that power solely in the trial judge. In holding that the statute was *ex post facto* to an individual whose crime was committed prior to its effective date the court stated:

> "... Assuming without deciding that it was the intent of the legislature to empower the judge in capital cases, under the procedure outlined in the statute, to reduce the death penalty to life imprisonment ... the new act of 1938, supra, was nevertheless ex post facto and inoperative as to the offense charged against the accused, in that, if enforced, it would operate to withdraw a substantial protection which surrounded him at the time of the commission of the alleged offense, to-wit, the right to a recommendation of mercy by the jury as a matter of grace (carrying a life sentence only), irrespective of the evidence or record, and irrespective of any procedure outlined in the new statute." *Id.* at 669.

Accord, Todd v. State, 187 S.E.2d 831 (Ga. 1972).

The supreme courts of Delaware and North Carolina responded to *Furman, supra*, by voiding all elements of jury discretiion in their respective death penalty statutes and leaving a mandatory death penalty upon conviction of a capital offense. *State v. Dickerson*, 298 A.2d 761 (Del. 1972) and *State v. Waddell*, 194 S.E.2d 19 (N.C. 1973). Recognizing that the removal of jury discretion constituted "an upward change of penalty be legislative action," *Waddell, supra* at 29, the North Carolina Supreme Court stated:

> "It thus appears that where the punishment at the time of the offense was death or life imprisonment in the discretion of the jury, as is the case before us, a change by the Legislature to death alone would be *ex post facto* as to such offenses committed prior to the change (cites) ... For the reasons stated we hold that North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed prior to the date of this decision but shall be applied to any offense committed after such date." *Id.*

While the amended Florida death penalty statute does not impose a mandatory death sentence it does convert what was a certainty (life upon recommendation to mercy) to a very uncertain proposition, thereby exposing Petitioner to the enhanced prospect of a sentence of death.

3. The Florida Supreme Court held in *Lee v. State*, 294 So.2d 305 (Fla. 1974), that the twenty-five year no parole provision of Section 775.082(1) (1973) would be *ex post facto* if applied to an individual convicted of a pre-*Furman* offense. The Court then split the issue – yes, *ex post facto* as to the parole provision, no, not *ex post facto* as to the application of

the death penalty – and remanded Lee for resentencing pursuant to the "law in effect at the time of the commission of the offense." *Lee, supra* at 307.

As argued above, if Petitioner were to be remanded for re-sentencing, the only sentence which could be imposed is life imprisonment (with no restriction on eligibility for parole).

Petitioner can only agree with the statement in *Lee, supra*, that the addition of the delayed eligibility for parole provision exposes Petitioner to "a greater penalty" and is "an *ex post facto* application and clearly unconstitutional." *Id.* at 308.

This Court has expressed an opinion on the question of parole eligibility in *Warden v. Marrero*, 417 U.S. 662 (1974). In *Marrero*, Congress repealed a law denying parole to narcotics offenders.[17] Marrero was sentenced prior to the repeal of the no parole provision and by a habeas corpus proceeding sought to have the new statute[18] apply to him. This Court, in holding that a federal savings provision[19] preserved the no-parole provision for offenders convicted and sentenced prior to its repeal, first sought to establish that a deprivation of parole eligibility is penal in nature:

> "There are additional reasons for believing that the no-parole provision is an element of respondent's 'punishment.' First, only an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole (Cites). For the confined prisoner, parole – even with its legal restraints – is a long step toward regaining lost freedom.... Second, a repealer of parole eligibility previously available to imprisoned

[17] 26 U.S.C., Section 7237(d) (1964).

[18] 18 U.S.C., Section 4202 (1970).

[19] 18 U.S.C., Section 1103(a) (1970).

> offenders would clearly present the serious question under the *ex post facto* clause of Art. I, Section 9, cl. 3 (here dealing with federal legislation), of the Constitution, of whether it imposed a 'greater or more severe *punishment* than was prescribed by law at the time of the . . . offense.'
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> * * *
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> Thus, at least where, as in the case of respondent's narcotics offenses, Congress has barred parole eligibility *as a punitive measure*, we hold that the no-parole provision . . . is a 'penalty, forfeiture or liability. . . .'" *Id.* at 663, 664. *See also Love v. Fitzharris*, 311 F. Supp. 702 (N.D. Cal. 1970).

In deciding whether a statute is *ex post facto* in its application, courts should look to the "standard of punishment prescribed rather than to the sentence actually imposed." *Lindsey v. Washington*, 301 U.S. 397 (1937). The fact that Petitioner did not in fact receive a sentence of life imprisonment does not preclude a finding that he was exposed to the greater penalty and thus should be re-sentenced.

II.

APPLICATION OF THE DEATH PENALTY TO PETITIONER WAS A DENIAL OF EQUAL PROTECTION OF THE LAWS.

Since the date of filing of the petition in this cause, the Florida Supreme Court has receded from its earlier (1974) decision in *Lee v. State, supra.* Petitioner is of the opinion that the decision in *Rudolph Valentine Lee v. State of Florida, supra*, is dispositive of the equal protection issue. The Florida court reviewed the manner in which Lee had been sentenced to death, then to life

imprisonment and finally to death again in the confusion of legislative and judicial action in the aftermath of *Furman, supra.*

The court recognized the anomalous result achieved by applying the new death penalty to Lee when *Furman* and *Donaldson v. Sack, supra*, had clearly voided the death penalty for pre-*Furman* offenders:

> "Had the able attorney who represented the appellant at trial not requested the trial judge to reduce the death sentence under the then – recent *Furman* decision, *this appellant's sentence would have been reduced to life in Anderson v. State, supra.*" (Emphasis added) *Rudolph Valentine Lee, supra.*

Had Petitioner been tried for his pre-*Furman* offense prior to the enactment of the new death penalty statutes, and had he been sentenced to *death*, that sentence would have been reduced to life pursuant to *Anderson* and *Baker, supra.* Courts must establish some point of reference upon which to base decisions affecting substantial rights of individuals. The Fourteenth Amendment equal protection clause denies "to the states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). Although, under this standard "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," it is impossible to attribute any rational basis for applying the new death penalty statute to Petitioner.

The obvious objective of the Florida legislation in the wake of the *Furman* decision was to conform Florida law to that holding and to provide for more severe punishment in the event the new death penalty provisions would not pass constitutional muster. This is

evidenced by the no-parole provision of Chapter 72-118, Laws of Florida which was ultimately amended to the current twenty-five year restriction on parole eligibility of Section 775-082(1), F.S.A. (1975).

In *Baker, supra*, it was noted that if the class of pre-*Furman* offenders could not be re-sentenced to life imprisonment prior to the effective date of Chapter 72-118, *supra*, serious constitutional problems would be encountered:

> "The Petitioner asserts that the Attorney General, the several circuit judges, state attorneys, public defenders have all shown great concern and have worked hard and cooperatively to achieve these re-sentencings in a speedy manner, thereby avoiding unnecessary litigation as to the validity of C. 72-118. . . . To allow this burdensome situation to fester into great constitutional litigation when all concerned have worked hard to avoid such a confrontation seems pointless. Moreover, since the Supreme Court of Florida has already acted with dispatch on behalf of a number of these persons, it would be a denial of equal protection and due process of law to deny similar relief to all persons whose death sentences have been vacated but who have not yet been re-sentenced to a term of years or life imprisonment as the case may be." *Id.* n. 4 at 334.

The court went on to state that:

> "There appears to be no reason why the remaining members of the class need be treated differently. To do so would create a class statutorily denied parole, while facing life terms in prison. The uniqueness of this position would fester litigation attacking both the facial validity of the statute (C. 72-118) and its selective application to an indistinguishable few – a seeming denial of equal protection." *Id.* at 334, 335.

The expedited re-sentencing accomplished in *Baker, supra*, was opposed by the state. The apparent reason was to attempt to bring those offenders within Chapter 72-118. In the case *sub judice* the State seeks to exclude Petitioner from the class of pre-*Furman* defendants. The court in *Anderson* and *Baker, supra*, dealt with the class of convicted and sentenced pre-*Furman* offenders. It would perhaps have been premature but surely not outside the authority of that court to widen the class to encompass all individuals charged with offenses occurring prior to the effective date of the new death penalty statutes.[20]

If a co-defendant had been charged with the same offense for which Petitioner was sentenced to death, and if the co-defendant had been apprehended, tried and convicted contemporaneously with Rudolph Valentine Lee, the ultimate sentence could have been no more than life imprisonment with no restriction on eligibility for parole. Where fundamental values are concerned, classifications must be closely scrutinized to

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[20]There were in fact defendants charged with "capital" offenses who were tried as non-capital "life" cases in the same trial circuit in which Petitioner was tried and sentenced to death. In fact the case of *Franklin Delano Prince, supra*, was tried before the same trial judge as Petitioner for first degree murder. Prince, as noted earlier, was tried before a jury of six and faced a maximum sentence of life imprisonment. *Prince v. State, supra.* The case of *Edred Augustus Black*, Case No. 72-4821, Division R of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, was a first degree murder prosecution tried before a jury of six between May 20, 1974 and May 24, 1974. Even more anomalous is the fact that all three defendants on appeal in *State ex rel Manucy v. Wadsworth*, 293 So.2d 345 (Fla. 1974), were charged with "capital" crimes yet tried as non-capital cases after the enactment of the new death penalty statutes. *Manucy* was cited in *Miller v. State, supra*, in support of the holding that application of the new statutes was not *ex post facto.*

insure that they correspond to valid state concerns urged as supporting them. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669-670 (1966) *citing Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). There can be no more fundamental value than life itself. Before a life may be taken by judicial action a most stringent review of the criteria for applying the extreme penalty must be undertaken, *Proffitt, supra*, in order that similar results are reached in similar cases. 96 S.Ct. at 2966, *citing State v. Dixon*, 283 So.2d 1, 10 (1973).

In *Rudolph Valentine Lee, supra*, the court did not think that "the question of whether a person should live or be put to death by the State should be determined by the legal procedures of when his request for reduction of sentence was made." Petitioner should not have that question decided by the fact that he was tried, convicted and sentenced subsequent to December 8, 1972.

The Florida Supreme Court held in *Lee*:

> "We have considered the issue carefully, and it is our judgment that the constitutional mandate of equal protection requires reduction of appellant's sentence from death to life." *Id.*

Petitioner would ask for no less.

In deciding what law should have been applied to Petitioner the Florida Supreme Court apparently overlooked the general savings provision of the Florida Constitution, Article X, Section 9, which provides: "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." This provision of the 1968 Florida Constitution amended the earlier Article III, Section 32 of the 1885 Florida Constitution which provided: "the repeal or amendment of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment." These

provisions have a long history in the case law of the State of Florida. Petitioner raised the provision as a bar to trying his case under the new death penalty statutes in his brief on appeal to the Florida Supreme Court, but the issue was not addressed in the decision of the court. *Dobbert, supra.*

The provision has been interpreted in the same manner as the *ex post facto* clauses of the state and federal constitutions.[21] In *Raines v. State*, 42 Fla. 141, 28 So. 57 (1900), the plaintiff in error, Raines, complained of being sentenced as a felon when the crime for which he had been convicted was converted to a misdemeanor prior to sentencing. Citing the 1885 savings provision the Florida Supreme Court said:

> ". . . but Section 32 of Article III of our constitution . . . prevents the said Chapter 4728 from affecting either the prosecution or prior prescribed penalties for any crime committed prior to the taking effect of such *ex post facto* law. The effect of this constitutional provision is to give to all criminal legislation a prospective effectiveness; that is to say, the repeal or amendment, by subsequent legislation, of a pre-existing criminal statute, does not become effective, either as a repeal or amendment of such pre-existing statute, insofar as offenses are concerned that have been already committed prior to the taking effect of such repealing and amending law." *Id.* at 58.

The provision operates to require the application of the original law whether or not the change is procedural or substantive. In *Ex Parte Brown*, 93 Fla. 332, 111 So. 518 (1927), the Supreme Court of Florida agreed with

[21]The failure of the Florida Supreme Court to address the issue and apply the state constitutional provision might more properly be considered as a violation of Fourteenth Amendment due process, although the issue was not framed as such in the petition.

Mr. Brown that pursuant to the savings provision, he was entitled to be hung rather than electrocuted when a successful appeal of his first conviction carried the second trial and conviction into the era of execution in the electric chair:

> "The sentence should have been hanging, as provided by the statutes as of October, 1923, when the crime was committed, and not by electrocution under the statute which became effective January 1, 1924." *Id.* at 519.

See also, Sigsbee v. State, 43 Fla. 524, 30 So. 816 (1901), *Whatley v. State*, 46 Fla. 145, 35 So. 80 (1903), *Gray v. State*, 72 Fla. 487, 73 So. 583 (1916), *Shields v. State*, 78 Fla. 524, 83 So. 391 (1919), *Higginbotham v. State*, 88 Fla. 26, 101 So. 233 (1924), and *Washington v. Dowling*, 92 Fla. 601, 109 So. 588 (1926).

The provision also operates regardless of the effect of the repeal or amendment upon the accused.[22] In recent years the Florida courts have utilized this savings provision to defeat a sentence of four years in the state prison upon a revocation of probation when the maximum sentence at the time the individual was placed on probation was two years. *Rozinski v. State*, 298 So.2d 546 (2d DCA Fla. 1974); to uphold a sentence of seven years in the state prison when the maximum term had been reduced subsequent to the date of the offense. *Ellis v. State*, 298 So.2d 527 (2d DCA Fla. 1974), *cert. dismissed* 298 So.2d 411 (Fla. 1974). *Accord, Cooper v. Wainwright*, 308 So.2d 182 (4th DCA Fla. 1975) and *Lane v. State*, 337 So.2d 976 (Fla. September 23, 1976).

[22]Ordinarily the *ex post facto* clause is not applied to defeat the prospective application of a statute which ameliorates or mitigates an individual's crime or punishment.

In an official opinion of the Attorney General of Florida, number 72-75 of March 10, 1972, an issue very similar to that in the case sub judice was submitted.

The Florida rape statute, prior to January 1, 1972, provided that upon a recommendation of mercy by the jury, a person convicted of rape would be sentenced to life *or any term of years*, within the discretion of the judge. The 1972 amendment removed the possibility of any sentence other than life imprisonment.

The Attorney General addressed the issue of a rape *committed* prior to January 1, 1972:

> "However, this change in penalties has no effect upon the punishment for rape committed prior to January 1, 1972, even though a conviction was not obtained until on or after that date; in such a case the penalty provided by section 794.01, Florida Statutes *1969*, is to be imposed and this means that if there is a recommendation of mercy, the defendant may be sentenced to either life imprisonment or any term of years. This is so because Article X, Section 9, 1968 Constitution of Florida, provides that:
>
> 'SECTION 9. Repeal of criminal statutes.—Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.'
>
> Turner v. State, 99 So. 334, 336 (Fla), illustrates the application of a former constitutional provision to exactly the same effect as said Article X, Section 9, viz., Article III, Section 32, Florida Constitution of 1885." 75 Op. Atty. Gen. (1972).

The Attorney General of the State of Florida thus has recognized the binding effect of Article X, Section 9 of the Florida Constitution. The case law interpreting this provision has consistently upheld the view expressed in the Attorney General's opinion, *supra.*

The proper course of action for the trial court in the case sub judice was to first attempt to place the Petitioner in the same position he would have been if there had been no repeal or amendment of Florida Statutes, Sections 775.082(1) (1971) and 921.141 (1971). Since Florida death penalty statutes had been ruled unconstitutional at the time of Petitioner's offense, the trial court should have gone forward with the understanding that the maximum penalty remaining after *Furman* and *Donaldson v. Sack, supra*, would be life imprisonment. Petitioner and those other individuals whose crimes were committed during the time when no death penalty could be imposed are entitled to equal protection under this constitutional savings clause.

III.

PETITIONER DID NOT RECEIVE A FAIR TRIAL IN JACKSONVILLE, FLORIDA DUE TO THE SATURATION OF THE COMMUNITY WITH INHERENTLY PREJUDICIAL PUBLICITY.

The denial of Petitioner's motion for change of venue in the trial court, affirmed by the Supreme Court of Florida below, presents a violation of the Due Process Clause of the Fourteenth Amendment factually distinguishable from this Court's recent decision in *Murphy v. Florida*, 421 U.S. 794 (1975).

The sole question raised by Petitioner relevant to the issues ruled upon by this Court in *Murphy, supra*, is whether or not the trial setting was inherently prejudicial to the extent that a fair and impartial jury could not be selected to try the case.

The standard of *Irvin v. Dowd*, 366 U.S. 717 (1961), has not been altered by the decision in *Murphy*. This

Court will set aside the conviction in the Florida court below only if, after considering the totality of the circumstances, it is satisfied that the "fundamental principles of liberty and justice" necessary to ensure "those minimal historic safeguards for securing trial by reason" have been disregarded. *McNabb v. United States*, 318 U.S. 332, 340-341 (1943), *citing Herbert v. Louisiana*, 272 U.S. 312 (1926).

Applying this standard requires a factual, case-by-case comparison. Petitioner assumes that the decision in *Murphy* has not established archetypal prejudicial situations without which there can be no reversal. The day when cameras are allowed into the courtroom and reporters allowed to sit at counsel tables are hopefully long past. State courts in general are not so provincial that they ignore the teachings of such momentous rulings as *Sheppard v. Maxwell*, 384 U.S. 333 (1966), *Estes v. Texas*, 381 U.S. 532 (1965), and *Rideau v. Louisiana*, 373 U.S. 723 (1963). Their effect has been to generally improve the conditions in state jury trials and more particularly our method of handling the trials of spectacular, big-press cases from that which caused Mr. Justice Frankfurter to lament in *Irvin v. Dowd*:

> "More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure.... [N]ot a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts.... exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of propossessions, evidence submitted in open court." 366 U.S. at 729, 730.

Indeed, the trial judge in the case *sub judice* acted, on the whole, reasonably in regard to the handling of publicity *during* the trial proper. The various court personnel and the attorneys on both sides were placed under a "gag-order" several days prior to jury selection. The order was issued *sua sponte* by the court. The jurors were properly admonished not to talk among themselves about the case during the voir dire and trial. The jurors were sequestered throughout the trial.

Petitioner, however, would ask this Court to review the publicity which *preceded* any action by the trial court and which led the prosecutor in the case to announce to the press following the conviction that this was the "biggest criminal trial in Jacksonville's history." (Jacksonville Journal, April 6, 1974).

Petitioner's case is not "on all fours" with Murph the Surf's, Dr. Sam Shepard's or with Billy Sol Estes'. Petitioner became the "notorious" child torturer Ernest John Dobbert, according to an article in the Jacksonville Journal dated April 18, 1973 (Exhibit 9, CV 102). His name became equated with child abuse in the City of Jacksonville.

Petitioner's crime was not robbery, as in *Murphy, supra*, or even an alleged passion – motived murder, as in *Sheppard, supra. Petitioner was charged with the systematic torture of his four children and with the premeditated murder of a son and a daughter, of tender years.* Petitioner does not argue that such a case could never be tried, only that a trial held in a community

charged with emotion[23] and steeped in the melodrama of the case history, could not comport with constitutional due process.

The material presented in the local press in Petitioner's case was substantive information concerning the preparation of the prosecution's case. Much of the information was inaccurate and inadmissible at trial. The trial court did nothing to prevent the local authorities (police, assistant state attorneys and representatives of the Division of Family Services) from disseminating the leads and leaks which found their way into the community via the media. Counsel for Petitioner was present throughout these proceedings and of course cannot convey to the Court the full extent to which the publicity pervaded the community. The following is offered as an aide to understanding the overwhelming and prejudicial nature of the media coverage:

Summary of Evidence and Testimony Presented at the Hearing on the Appellant's Motion for Change of Venue

WAPE is a Jacksonville Radio Station. In keeping with Federal Communications Commission rules, WAPE only keeps stories as old as six months (CV 10). All the

[23]Following the conviction and prior to sentencing, it was discovered that the trial judge received a number of letters. The contents were released to the press following sentencing and revealed the deep-seated feelings against Petitioner. For example: "Put this 'thing' to death . . . I do not sign this letter because this 'thing' will probably be paroled in seven years and I don't want to be another victim" and, "All men in this office feel he should be burned." Florida Times Union and Jacksonville Journal, articles dated April 15, 1974.

stories that WAPE presented during its news broadcasts over the past six months were accepted into evidence as Appellant's Exhibit 1. WAPE presents numerous news broadcasts through the hour and throughout the day, Monday through Friday (CV 12-13). From the records kept, there was no way of determining how many times each story had been presented on the air (CV 12). In the metropolitan Jacksonville area, during the period October and November of 1975, WAPE had an approximate listening audience over eighteen years of age of 103,300 during the period of 6:00 in the morning until midnight, Monday through Friday (CV 15-17).

WAPE files included twenty-two stories presented on the air from October 29, 1973 until March 15, 1974, the day of the change of venue hearing. The stories detailed the Appellant's return from Texas after losing his fight against extradition and stated:

> ". . . He is also being questioned about claims made by the son that he buried two other children. The boy told officials that a six-year-old brother, Ryder, and a nine-year-old sister, Kelly Ann, died in 1971 and 1972. He said Dobbert placed the bodies in plastic bags and finally buried them. No bodies were found in a search by authorities last year."

Other stories spoke about the possibility of a body-finding device being borrowed from the Navy to search for the children and wide speculation concerning where the bodies might be located. Louis David Blackshear, a news reporter with WAPE during the time prior to the only stories which were retained, covered the case at bar from its inception. He broadcast stories on almost a daily basis for over a month at the time the alleged crime was uncovered (CV 24-25).

WVOJ, a Jacksonville radio station, retained copies of news stories for one year (CV 25). WVOJ audience is

11,861 average listenership per hour from 6:00 A.M. until 7:00 P.M. (CV 26-28). This basic audience is in Duval County (CV 28).

WVOJ records included forty-six stories concerning the case at bar. Included in these were interviews with an FBI spokesman after the Appellant had been arrested in Houston, Texas; five taped interviews with Chief of Detectives Matt Touchton, of the Jacksonville Sheriff's Office, commenting upon the children, upon their burial, the interrogation of the Appellant and his state of mind. The State Attorney was quoted in two taped interviews concerning the penalty for child torture in relation to the case at bar and advocating that the penalty for child torture be increased to life imprisonment. A later interview, after a search in the Jacksonville Beaches, with Matt Touchton concerned the possibility of finding the bodies and the fact that Chief of Detectives Touchton felt that he had a good enough case without the bodies to prosecute for murder. The Chief Assistant Attorney who prosecuted the case at bar gave two taped statements which were broadcast by WVOJ concerning his optimism upon sustaining a conviction and whether he would seek the death penalty for the Appellant.

WQIK, another Jacksonville radio station, did not locally cover the case, but instead ran continuous stories from the Associated Press news coverage (CV 38-39). Monday through Friday, from 6:00 A.M. until 10:00 P.M. approximately 50,000 people listen to WQIK (CV 41-43).

WJAX radio did not originate local stories on the case at bar but used the stories which came from United Press International (CV 46-47). Each twenty-four hours, approximately 17,900 adult listeners heard WJAX (CV 47-49).

WMBR radio covered the case at bar locally (CV 51). WMBR kept stories from March, 1973 (CV 52-53). As

with most of the other stations, few of the tape cartridges which contain statements by officials concerning this case were available for transcription at the time of the hearing. (Exhibit 3, cover letter.) WMBR does not subscribe to the rating services, but is a twenty-four hour radio station, with the primary coverage in Duval County (CV 55-56).

WMBR files contained one hundred and six stories presented concerning the case at bar in the year prior to the change of venue hearing. Included in these were two interviews with the Chief Assistant State Attorney who would try the case and one interview with the State Attorney himself. The stories gave great import to the statements given by young John Dobbert to the police concerning the burial of his brother and sister and the trial court's statement at the hearing on the State's motion to raise bond that "I just wonder whether fifty-thousand is enough." On November 1, WMBR ran a story that the Appellant was seeking immunity and that if this was given him he "might lead" the police to where the bodies were buried, that he might "remember." This story was repeated on November 2. The Appellant's wife and her accompaniment of police officers in search of the bodies of the two missing children was also given large play. The court-ordered psychiatric exams were thoroughly covered as was the hearing at which the trial court adjudged the Appellant mentally competent to stand trial. Each of the Appellant's court appearances was covered by WMBR's courthouse reporter.

WIVY radio in Jacksonville, Florida, only kept broadcast stories from October of 1973. WIVY-FM broadcasts twenty-four hours a day and on AM from sunrise to sunset.

WIVY records included six stories, all from October, 1973. These stories included statements, such as:

"They may be through with Ernest Dobbert in Texas by next week. But Jacksonville police won't be through with him for a long time. Not until he has been on trial for child torture. Right now the two of his children still alive are in a mental hospital in Wisconsin. After the beatings and brutalities those two went through before they turned up abandoned two years ago in Jacksonville it's no wonder. It took police a year to find Dobbert in Texas, but Jacksonville police still remembered him and that's something he can't forget.

* * *

At the police station the grilling goes on but so far Dobbert isn't talking. Ernest John Dobbert is sitting in the chair Detectives G. H. Parker and E. L. Monroe are firing the questions. They're trying to find out if the prisoner they've just brought back from Houston will tell them what he did with two of his children. John Dobbert age 11 turned up beaten and bruised a year and a half ago and said he helped his father bury his brother and sister. But the secret is still buried deep in the very troubled mind of Ernest John Dobbert.

* * *

You remember Ernest John Dobbert. It was a year and a half ago when Dobbert's young son John turned up beaten and burned and told that horrible story to Jacksonville police. How he had helped his father bury his brother and sister. You remember the fake suicide that almost brought the case to a close. Well now Dobbert's back. . . .

* * *

The man who knows where the bodies are buried is back. But so far he isn't talking. . . . Police haven't found the bodies but now they've got the burier and this case isn't closed yet. . . .

* * *

Police never found those young bodies but now they've got the one man who can tell them. Jacksonville Police brought Dobbert back from Houston, Texas yesterday. He's been in jail there since March. He didn't want to come back to Jacksonville. But he's back and now there's a score police want to settle.

* * *

. . . The word from the police station is he's talking more now, but he still isn't telling where the bodies of two of his children are buried. And until he does he'll be buried in jail . . . and when he does too."

WOBS radio story files go back as far as April 17, 1972. WOBS presents news three minutes an hour and, two years before, had presented four five-minute newscasts per day. 20,000 persons in Jacksonville listen to WOBS between 6:00 A.M. and sunset (CV 73-74).

WOBS files showed seventeen stories concerning the case at bar. In one, the case at bar was identified as "that child abuse case that has been in the news for so long and nothing yet has happened." The stories stated that "according to Dobbert's son, Ernest, Jr. (sic), his father buried the bodies of his brother and his sister last year." Another story stated:

> "According to Assistant State Attorney Harry Shorstein since the return of accused child torturer Ernest Dobbert to Jax., his office has been flooded with a number of calls from persons suggesting secret military weapons which could be used to find Dobbert's two missing children. Shorstein said some of the suggestions sounded good, but that no secret devices exist."

WPDQ radio in Jacksonville had recently undergone a managerial change and records were only available from January of 1974 (CV 78-79). Three stories were admitted into evidence.

WJKS-TV, Jacksonville's UHF television station, presented two stories on the case at bar since December of 1973. Approximately 15,000 adults watch the news on WJKS (CV 88-89). Robert Ernest Walker, news director at WJKS, testified that on the date of the first news item, December 27, 1973, he received two phone calls from the Chief Assistant State Attorney, one indicating that the grand jury was deliberating and the second stating that the grand jury had returned an indictment (CV 93, 95).

The Florida Times-Union and the Jacksonville Journal are Jacksonville's only daily newspapers. The Times-Union has a circulation in Duval County of over 107,000 circulation in the morning and the Jacksonville Journal has approximately a 58,000 person circulation in the afternoon. The Sunday newspaper, a joint venture of the Times-Union and the Journal, has a circulation of over 130,000 persons per Sunday. (Exhibit 9, CV 102). The Times-Union and Journal ran approximately eighty-seven stories on the case at bar from April 14, 1972, until the day of the change of venue hearing. Arthur Allen Frederickson, Sr., Assistant Executive Editor of both newspapers, testified on cross-examination that he was confident the source of any information or story in the case at bar was the investigative officers involved (CV 106).

The first newspaper story appeared under the headline "GRISLY CHILD-ABUSE CASE PROBED – police seek father and child-abuse case," on April 14, 1972. On April 15, the newspaper ran a follow-up story including pictures of the Appellant, his wife, and the four children. On April 16, the Florida Times-Union ran a story under the headline, "Dobbert's Neighbor is Sorry She Kept Silent – 'I Won't Forget That Boy's Back' ". On April 17, the headlines stated, "Wife of Alleged Child Beater Arrives Here."

A banner headline in the Jacksonville Journal of April 18, 1972, stated, "DAUGHTER IN TORTURE CASE FOUND UNHARMED; SUICIDE BY FATHER?" Other stories explained that the police "Continue Hunt for Graves." The Jacksonville Journal claimed that "Boy Said 'Brainwashed' " in an article which included pictures of the children, later admitted at trial, and a picture of Ernest John, III, with his arm in a sling. Other articles explained "what one phone call may have avoided" and that "court rules Dobbert waifs as dependents." Police were "stymied in grave hunt" and a "fund to aid injured boy–abuse case" was begun by a Jacksonville bank. "Dobbert is sought nationwide" claimed another article on the same day that Mrs. Dobbert made a news media appeal to the Appellant to turn himself in to the police. A front page headline in the local news section informed the public that "Wisconsin to get Dobbert children." The City of Jacksonville was sued for two million dollars by the representatives of the children and this received extensive newspaper publicity, as did the suit when it was dismissed.

In August, another child abuse story began, "a suspected child-abuse and murder case reminiscent of the Dobbert tragedy earlier this year has been uncovered here. . . ." A November headline asked, "What's Police Duty in Child Beatings?" and the newspaper announced in February that "Police Win Dobbert Suit."

On March 9, 1973, a front page banner headline stated "TORTURE SUSPECT DOBBERT ARRESTED." And the next day the newspaper explained that "Police Incredulity Delayed Arrest of Dobbert. . . . But Child-Abuse Charges Finally Reach Houston." A front page banner headline in the Jacksonville Journal claimed, "TWO CHILDREN DEAD – DOBBERT – 'I'M GLAD IT'S OVER' HE SAYS." As the newspapers covered the

extradition story, on September 6, 1973, a Times-Union headline stated, "Shorstein Goes to Houston Soon for Dobbert Hearing."

The Appellant's return was thoroughly covered, including newspaper pictures of him leaving a squad car, and bond being raised to $50,000 garnered banner headlines. The unsuccessful police search for the graves led to a newspaper photograph of Detective Munro digging and police comments concerning the clues the Appellant had given them. On December 12, 1973, the newspapers printed that the Appellant was sane and competent to stand trial.

A special report in the Jacksonville Journal on December 10, 1973, explained, "Dobbert could be tried for murder even without bodies."

Throughout the pendency of the case at bar, repeated articles appeared explaining the high amount of child abuse in Jacksonville, Florida in such terms as, "Jacksonville, already famous over the notorious allegations of child torture by Ernest Dobbert, also has a second infamous distinction"; Mrs. Price (of the Family Services Division) speculated the wide publicity given the Dobbert case in Jacksonville "may have led a larger number of people to report suspected abuse cases." No more identification or explanation was needed to identify the case at bar in child abuse articles.

There are two major television stations in Jacksonville, Florida – WJXT-TV and WTLV-TV. WTLV ran sixty-four stories on the case at bar prior to the change of venue hearing (CV 109); WJXT broadcast approximately seventy-seven stories on the case at bar (CV 136). Both stations presented statistics of their broadcast audience during newscasts at the times the stories concerning the case at bar were presented. (Exhibit 10, 12). The 6:00 news on the two stations combined reached between 150,000 and over 200,000 persons,

depending on which day the story was broadcast. For example, in November, 1973, the 6:00 news on the two stations combined was watched by almost 300,000 persons.

The news stories from both stations are extensive and can only be understood in their full context by reading each story. However, the stories in which sound film was used are extremely important and indicative of the publicity in the case at bar. WTLV also used chromakey slides when certain news broadcasts were being presented. Two slides used were of Ernest John, III, showing the scars on his back, and the other picture was an unflattering sketch of the Appellant, which was used often.

The news stories on both stations minutely chronicled the case from its inception until the change of venue hearing was held. There are repeated statements from law enforcement officers and comments on statements made by the Appellant, his wife and his children, who were wards of the court and placed in Wisconsin. Some representative stories included:

Film interviews with the Appellant's neighbors and co-workers; extensive film upon the return of the Appellant to Jacksonville in the custody of police officers and the visitation of his wife to him while he was being interrogated in the Duval County Courthouse. The State Attorney in a filmed interview stated that the State would not enter into any plea bargaining in this case and would push for the maximum punishment because children were involved. Both stations extensively covered the search for the bodies, including digging and showing the clues allegedly coming from the Appellant on film on numerous broadcasts. One film explained that under hypnosis, Ernest John Dobbert, III, had told the police where he thought the bodies were buried. The Chief Assistant State Attorney,

in a film interview, explained that this would not be an easy case to prosecute without the bodies, but it was "not unheard of and it's not without precedent" to prosecute a murder case without bodies.

There is no question that a motion for change of venue is addressed to the sound discretion of the trial court. *Singer v. State*, 109 So.2d 7 (Fla. 1959). In exercising that discretion, however, the trial court should make every effort to decide the issue based on his feel for the mood of the community and he should be guided by the evidence presented to him by either the defense or the prosecution. *Sheppard, supra*, at 360. In the case sub judice the trial court admitted that he had not reviewed the voluminous evidence introduced at the hearing on Petitioner's motion for change of venue (Tr 25) prior to ruling that an attempt would be made to select a jury (A 27). The court merely noted that actual prejudice had not been shown (CV 1265-66). It would be unfortunate if courts were allowed to apply mechanistic rules when deciding issues which may determine whether an individual lives or dies.

By ignoring the substance of the evidence presented by Petitioner in support of his motion for change of venue, the trial court forced Petitioner to choose from a panel of prospective jurors so thoroughly immersed in the distorted reports appearing in the media that the minds of even the most sincere among them could not be purged. Of eighty-eight jurors examined on voir dire, thirteen indicated that they had no knowledge of the facts of the case. Many of these individuals no doubt felt that they were being completely truthful and yet the majority of them indicated that they read the local papers and listened to or watched at least one radio or television station. In *Irvin v. Dowd, supra*, this Court recognized that where the prospective jurors have been

exposed to "deep and bitter prejudice" shown to be present in the community and when the jurors are exposed to the admitted prejudice of their fellows,[24] little weight can be given to their statements of impartiality.

A second hard choice was forced upon Petitioner by the trial court's decision to attempt jury selection in Jacksonville. In order to preserve a proper record on appeal in Florida it is almost imperative that all peremptory challenges be exercised. *Hawkins v. State*, 206 So.2d 5 (Fla. 1968), *accord, Kelley v. State*, 212 So.2d 27 (2d DCA Fla. 1968) and *Gavin v. State*, 259 So.2d 544 (3d DCA Fla. 1972), *Dobbert, supra.* But the first duty of defense counsel is to attempt to select a jury which be as fair as possible under the circumstances. Petitioner was on trial for his life and a reversal on appeal is never such a certainty that a defendant's substantive right to a fair trial should be subordinated to an arbitrary requirement that all peremptory challenges be exercised. As counsel for Petitioner stated:

> "The defense accepts the jurors tentatively. We would like to say we do it with reservations. The defendant moved for a change of venue. It was taken under advisement and denied pending jury selection. The defendant does not waive this motion. The evidence presented in the change of venue (sic) shows the defendant would not receive a fair trial in Duval County. . . . [I]t would be

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[24]The jury selection in the case sub judice began by taking jurors one at a time. After having interviewed twenty-seven jurors in several days with only five having no knowledge of the case the trial court began calling three jurors at a time. The court began timing the attorneys (Tr 636-44) and repeatedly prompted them to speed up the selection. The court then further accelerated the pace and began to call six jurors at a time. (See Florida Times Union article dated March 21, 1974).

unfair, and it further prejudiced the defendant's right to a fair trial if we were required to exercise all of our peremptory challenges, since he must choose from a jury panel here in Duval County. Be tried from a jury panel here in Duval County. It must be clear on the record we don't waive our change of venue motion, but we will accept this jury because it is the best jury under the circumstances, but does not meet the constitutional standards for fair trial." (Tr)

At the time Petitioner accepted a panel of jurors there were approximately forty-seven prospective jurors remaining in the courtroom and seventy-five more available on call from the regular circuit court panel not utilized by other courts in session.[25] If Petitioner had peremptorily challenged five of the tentatively selected jurors, thus exhausting his non-cause challenges, the chances of seating five who had the same or a lesser degree of exposure to the "facts" of the case and who would be otherwise acceptable would be small. The State had thirteen remaining peremptory challenges and could have effectively destroyed the panel as tentatively accepted if Petitioner had exhausted those last five challenges. Given the subconscious, psychological impact of the media barrage, only the most open-minded and well-adjusted juror could be expected to provide a clear basis for a challenge for cause:

(By defense counsel)
"Q. Now, Mr. Alderman, you said that you had heard quite a bit about the case, is that correct, before you came to Court?

(By juror Archie G. Alderman)
A. Yes.
Q. How did you hear about that?
A. Radio and TV.

[25]Jacksonville is a metropolitan city of over 500,000 persons with 21 circuit judges serving a three-county area.

Q. Did you say you followed it closely?
A. I didn't follow it deliberately. It was there. Every morning you turn TV on and see what is happening.
Q. Did you have a fixed opinion when you came in the Courtroom a few days ago as to the guilt or innocence of my client, Mr. Dobbert?
A. Yes.
Q. You did?
A. Yes.
Q. What was that opinion?
A. That he was guilty. . . ."

Where the crime charged is itself so inflammatory and emotive, the subtle pressures and opinion-producing elements cannot be objectively measured so as to allow a court or an individual to point to juror number one or juror number twelve and say, "he is the one who did not admit that he could not put aside what he had heard and seen and read." As Justice Boyd said in his dissenting opinion below:

"The Constitutions of the United States and Florida permit the news media to write extensively about crime and criminals and to discuss the gory details of crime before and during trials. This is a constitutional right that I recognize and respect; however, other constitutional provisions grant persons charged with crime the right to be tried fairly, under due process of law, in an atmosphere of fairness and without prejudice in the minds of the jury. Rarely in the history of Florida has any crime created greater public attention than the activities of the Appellant in the treatment of his children, culminating in two convictions of murder and two convictions of child abuse (sic). It is my opinion that the court should have granted the motion for change of venue in order that the Appellant might be tried in some part of Florida

in which the magnitude of his crimes was not so widely known and so freely discussed among the populace." *Dobbert, supra* at 443, 444.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed and the Petitioner granted a new trial in a venue other than Jacksonville, Duval County, Florida with the maximum possible sentence of life imprisonment with no restriction on eligibility for parole.

Respectfully submitted,

/s/Louis O. Frost, Jr.
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